

FEDERAL COURT OF AUSTRALIA

Kumra v Minister for Immigration and Border Protection [2017] FCA 778

Appeal from: *Kumra v Minister for Immigration & Anor* [2016] FCCA 2632

File number: VID 1154 of 2016

Judge: **MOSHINSKY J**

Date of judgment: 11 July 2017

Catchwords: **MIGRATION** – appeal from Federal Circuit Court of Australia – application for Skilled (Residence) (Class VB) Sponsored (Full Fee) (Subclass 886) visa – where Migration Review Tribunal found that the appellant did not satisfy Public Interest Criterion 4020 on the basis that his skills assessment was a “bogus document” as defined – where appellant did not provide any evidence to the Tribunal in response to invitation to comment – whether decision of Tribunal affected by jurisdictional error – appeal dismissed

Legislation: *Migration Act 1958* (Cth), ss 5, 97, 359C, 360, 395A
Migration Regulations 1994 (Cth), Sch 2, cl 886.225

Cases cited: *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142
Singh v Minister for Immigration and Border Protection [2016] FCAFC 141

Date of hearing: 10 March 2017

Date of last submissions: 23 March 2017

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 27

Counsel for the Appellant: The appellant appeared in person

Counsel for the First
Respondent:

Mr R Knowles (for supplementary submissions after the
hearing)

Solicitor for the First
Respondent:

Ms L Helsdon, Sparke Helmore (for the hearing on
10 March 2017)

Solicitor for the Second
Respondent:

The second respondent filed a submitting notice, save as to
costs

ORDERS

VID 1154 of 2016

BETWEEN: **ASHISH KUMRA**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **MOSHINSKY J**

DATE OF ORDER: **11 JULY 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs of the appeal, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 On 31 October 2008, the appellant, a citizen of India, applied for a Skilled (Residence) (Class VB) — Sponsored (Full Fee) (Subclass 886) visa. Subsequently, on 21 November 2008, the appellant provided a skills assessment from Trades Recognition Australia (**TRA**) in support of his visa application. That skills assessment (the **TRA skills assessment**) relied upon a reference letter from Pastry Art Design stating that the appellant had worked for the business as a pastry cook during the period 4 January 2007 to 7 January 2008 and had completed more than 930 hours of work.

2 On 5 December 2014, a delegate of the first respondent (the **Minister**) decided to refuse the application for the visa. The delegate concluded that the TRA skills assessment was a “bogus document” (as defined) because the delegate reasonably suspected that it was a document that was obtained because of a false or misleading statement made to TRA, namely the reference letter from Pastry Art Design. Accordingly, the delegate found that the appellant did not satisfy Public Interest Criterion 4020 (**PIC 4020**) and therefore did not satisfy the criteria for the grant of the visa in cl 886.225 of Sch 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**).

3 The appellant applied to the Migration Review Tribunal (the **Tribunal**), now the Administrative Appeals Tribunal, for review of the delegate’s decision.

4 On 3 June 2015, the Tribunal decided to affirm the decision of the delegate. The Tribunal found that the TRA skills assessment was a “bogus document” (as defined) because there was a reasonable suspicion that it was obtained by the appellant from TRA on the basis of a false or misleading statement, namely the reference letter from Pastry Art Design. The Tribunal concluded that the appellant did not satisfy PIC 4020, and therefore did not satisfy the criteria for the grant of the visa in cl 886.225.

5 The appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision. The appellant was not represented by a lawyer in the Federal Circuit Court proceeding. The grounds of the application were:

The [Tribunal] erred in not giving consideration to the fact that I did not provide a fraudulent document. I provided evidence to that effect. The [Tribunal] disregarded the evidence. Accordingly, the [Tribunal] erred as a matter of law.

Although this ground contains a contention that the appellant had provided certain evidence to the Tribunal, the Tribunal's decision records that the appellant did not provide a response to its letter inviting him to comment on information bearing upon whether the TRA skills assessment was a "bogus document" (as defined). The appellant did not put forward any evidence in the Federal Circuit Court proceeding to the effect that this statement in the Tribunal's reasons was incorrect, or to the effect that he had provided evidence to the Tribunal.

6 6 On 12 September 2016, a hearing took place in the Federal Circuit Court. In *ex tempore* reasons, the primary judge dismissed the appellant's application. The primary judge considered that the Tribunal had correctly applied the relevant law to the facts of the matter.

7 7 The appellant appeals to this Court from the judgment of the Federal Circuit Court. His notice of appeal, which was evidently prepared without the benefit of legal representation, contains three grounds, including that the Federal Circuit Court failed to assess the evidence that was the basis for the refusal of the visa. The appellant did not file any submissions. He appeared for himself at the appeal hearing, and made some brief oral submissions.

8 8 For the following reasons, the appeal is to be dismissed. The appellant has not established any error in the decision of the Federal Circuit Court.

Background facts

9 9 The following statement of the background facts is based on the documents contained in the Appeal Book.

10 10 On 31 October 2008, the appellant applied for a Skilled (Residence) (Class VB) — Sponsored (Full Fee) (Subclass 886) visa.

11 11 On 21 November 2008, the appellant provided the TRA skills assessment to the Department of Immigration and Citizenship, now the Department of Immigration and Border Protection (the **Department**). This document was issued on the basis of a reference letter from Pastry Art Design stating that the appellant had worked for the business as a pastry cook

during the period 4 January 2007 to 7 January 2008 and had completed more than 930 hours of work (AB 157).

12 12 On 27 August 2014, the Department invited the appellant to comment on certain information bearing on whether the TRA skills assessment was a “bogus document” as then defined in s 97 of the *Migration Act 1958* (Cth) (the **Act**) (AB 88-92).

13 13 On 5 December 2014, the delegate decided to refuse the application for the visa (AB 99-104). The basis of the decision was that the TRA skills assessment was a “bogus document” (as defined) because the delegate reasonably suspected that it was a document that was obtained because of a false or misleading statement made to TRA, namely the reference letter from Pastry Art Design. The delegate noted in the course of the reasons that, on 27 August 2014, the delegate had written to the appellant inviting him to comment on certain matters and that no response had been received.

14 14 The appellant applied to the Tribunal for review of the delegate’s decision.

15 15 On 23 March 2015, the Tribunal wrote to the appellant inviting him to provide information in relation to his compliance with the requirements in PIC 4020 (AB 150-154). The letter to the appellant was attached to an email sent to his migration agent. The letter stated that a response should be received by the Tribunal by 7 April 2015, but an extension of time could be sought. The letter warned that if the requested information was not provided, the appellant would lose any entitlement he might otherwise have to appear before the Tribunal to give evidence and present arguments.

16 16 On 7 April 2015, the appellant’s migration agent responded to the email dated 23 March 2015 from the Department (AB 160). The migration agent thanked the Tribunal officer for the email and stated that he had forwarded it to his client. The migration agent noted that his client “won’t be able to make this appointment tomorrow dated 07th April 2015 because he is not well” and attached a medical certificate. It is unclear why this email refers to an “appointment”, as the email and letter dated 23 March 2015 (to which this email was apparently responding) had sought information. The letter continued: “My client is requesting for [sic] extension of time from Migration Review Tribunal as he won’t be able to make the appointment because of his sickness. We look forward to receive positive reply from the Migration Review Tribunal with a future invitation date to provide information for

my client Mr Ashish Kumra.” A copy of the medical certificate, dated 6 April 2015, appears at AB 161.

17 17 On the same day, the Tribunal officer responded to the migration agent’s email (AB 163-165). Attached to the email was a letter addressed to the appellant granting an extension of time to 21 April 2015. The letter warned that if the Tribunal did not receive the information by 21 April 2015: the Tribunal may make a decision on the review without taking any further action to obtain the information; and the appellant would lose any entitlement to appear before the Tribunal to give evidence and present arguments.

18 18 On 15 May 2015, a Tribunal officer sent an email to the appellant’s migration agent (AB 169-171). Attached to the email was a letter to the appellant noting that he had not provided information in response to the earlier request. The letter stated that, in the circumstances, s 359C of the Act applied and, pursuant to s 360(3), the appellant was not entitled to appear before the Tribunal.

19 19 Also on 15 May 2015, a Tribunal officer sent an email to both the appellant and his migration agent (AB 172-178). Attached to the email was a detailed letter to the appellant, inviting him to comment on particular information suggesting that the TRA skills assessment was a “bogus document”, as now defined in s 5(1) of the Act. The letter stated that: the appellant was invited under s 395A to give comments or respond to the information in writing; and a response should be received by 29 May 2015, although an extension of time could be sought.

The Tribunal decision

20 20 On 3 June 2015, the Tribunal decided to affirm the decision of the delegate. The Tribunal’s decision and reasons are set out in a decision record (AB 182-194). The following aspects of the Tribunal’s reasons are noted:

- (a) (a) At [3]-[5], the Tribunal referred to its letter inviting the appellant to provide certain information in relation to the requirements of PIC 4020. The Tribunal noted that the appellant was granted an extension of time in which to respond, but did not respond. Consequently, the Tribunal wrote to the appellant on 15 May 2015 to the effect that he had lost the right to a hearing.
- (b) (b) The Tribunal noted, at [6], that by a separate letter dated 15 May 2015, the Tribunal had invited the appellant to comment on, or respond to, certain

adverse information. The Tribunal stated that the appellant had not responded to that letter.

- (c) (c) The Tribunal identified, at [11] of its reasons, the issue in the review as being whether the appellant satisfied PIC 4020, as required for the grant of the visa by cl 886.225 of Sch 2 to the Regulations. Attached to the Tribunal's decision was a copy of PIC 4020, which relevantly provided as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.

...

- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.

- (d) (d) Also attached to the Tribunal's decision was a copy of the definition of "bogus document" in s 5(1) of the Act. This definition, which is identical to the definition in the former s 97 of the Act that applied at the time of the delegate's decision, was as follows:

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

- (e) (e) The Tribunal set out the background circumstances to the "bogus document" issue at [16]-[17] of its reasons. The Tribunal stated that Mr X (a pseudonym adopted for the purposes of this judgment) had made admissions to authorities which included that "he created false work references and other

documents for prospective visa applicants in return for money, and in turn paid employers who would agree to support the false work claims if they were contacted by immigration and other authorities”.

- (f) (f) At [19] of the reasons, the Tribunal set out in full the letter that it had sent to the appellant inviting him to comment on certain adverse information concerning his TRA skills assessment (ie, the second letter of 15 May 2015 referred to in [19] above). As well as referring to general admissions made by Mr X, the letter stated that Mr X had implicated the proprietor of Pastry Art Design and the appellant’s migration agent in the scheme. The letter also noted that an unsigned work reference from O’Heas Bakery & Deli, bearing the appellant’s name, was found at Mr X’s premises.
- (g) (g) The Tribunal stated, at [20], that its letter was sent not only to the authorised recipient (ie, the appellant’s migration agent), but also directly to the appellant himself. The Tribunal noted, at [21], that the appellant had not responded to the Tribunal’s letter.
- (h) (h) The Tribunal made findings at [22]-[32] of its reasons. The Tribunal stated
(at [24]) that the “central proposition” it had put to the appellant (by the letter described above) was that the evidence found in the possession of Mr X, bearing the appellant’s name, suggested that the appellant “had a need to approach [Mr X], who was in the business of fabricating false work references for visa application purposes, and that need existed because the [appellant] had not completed ... at least 900 hours of work experience in the nominated occupation ... which would normally have induced an employer to provide a genuine work reference without charge”. The Tribunal stated (at [29]) that the appellant had not provided an explanation and, on the evidence, there was no sufficient explanation as to why Mr X had in his possession a work reference bearing the appellant’s name.
- (i) (i) The Tribunal further stated, at [32], that the appellant, in the review process before the Tribunal, had been unable to present convincing evidence that he completed the work experience at Pastry Art Design “sufficient to outweigh the inference created by [Mr X’s] evidence which suggests that he did not”.

- (j) (j) The Tribunal concluded, at [33], that the TRA skills assessment was a “bogus document” (as defined) because there was a reasonable suspicion that it was obtained by the appellant from TRA because of a false or misleading statement in the work reference given to TRA, namely the Pastry Art Design reference letter. As the appellant gave, or caused to be given, the TRA skills assessment to the delegate, an officer of the Department, in relation to the application for the visa, he did not satisfy PIC 4020(1).
- (k) (k) Finally, the Tribunal considered whether the requirements of PIC 4020(1) should be waived. It noted that the appellant had not put forward any circumstances for consideration in relation to waiver and concluded that, on the evidence, there were no circumstances falling within PIC 4020(4). Accordingly, the Tribunal decided that the requirements of PIC 4020(1) should not be waived.

The Federal Circuit Court decision

21 21 The appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. The grounds of the application have been set out at [5] above. The Federal Circuit Court dismissed the application. The primary judge’s reasons for dismissing the application are found at [15]-[18] of the reasons. After referring to the ground of judicial review set out in the application, the primary judge stated (at [16]-[17]):

16. Contrary to the Applicant’s assertion in that ground, as stated in his application, it does not appear, on the material before the Court, that the Applicant provided any evidence at all to the Department or to the Tribunal which indicated that he did not provide a fraudulent document. I note the Tribunal sent a request to the Applicant for information under s.359(2) of the Act and an invitation to comment under s.359A. The Tribunal then proceeded to consider the evidence before it and made a finding open to it on that evidence which included the drawing of an inference from the information set out in its s.359A letter.
17. The Tribunal correctly applied the relevant law to the facts of this matter and properly considered whether, on the evidence, the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4).

The appeal to this Court

22 22 The appellant’s notice of appeal to this Court contains three grounds as follows:

1. The Federal Circuit Court failed to assess the evidence which was bases for refusal of my visa for not meeting requirements of Cl.886.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) Public Interest Criterion 4020 (PIC 4020) of the Migration ACT.

2. The Federal Circuit Court disregarded the evidence which was bases of the original decision.
3. The Federal Circuit Court failed to accord me, the applicants, procedural fairness and natural justice.

(Errors in original.)

23 23 In his brief oral submissions at the appeal hearing, the appellant maintained that he had worked for one and a half years at the bakery, but said that he did not have any evidence to prove it. He also said that he had sent “them” a letter to this effect. It appears that the reference to “them” was to the Department. The appellant did not produce a copy of any such letter. In response to a question from the Court as to whether he had provided a copy of any such letter to the Federal Circuit Court, the appellant said that he had not. In response to a question from the Court as to whether there was anything in particular that he relied upon in support of the third ground of appeal, the appellant said that there was not.

24 24 In my view, none of the appellant’s appeal grounds is made out. The first two grounds are based on an erroneous premise, namely that the Federal Circuit Court was required to assess the evidence before the Tribunal that formed the basis of the Tribunal’s decision. The role of the Federal Circuit Court was to consider the judicial review grounds raised in the appellant’s application to that Court. The Federal Circuit Court did consider those grounds and no error is shown in its disposition of those grounds. In particular, the grounds before the Federal Circuit Court included the contention that the appellant had provided evidence to the Tribunal that he had not provided a fraudulent document. However, that does not appear to be correct. The Tribunal stated that the appellant had not responded to its letters inviting him to comment. Further, the appellant did not provide any evidence to the Federal Circuit Court (or this Court) that the Tribunal’s statement was incorrect and that he had in fact provided evidence of this kind to the Tribunal.

25 25 As for the third ground in the notice of appeal, as noted above the appellant was unable to provide any particulars of how it is said that he was denied procedural fairness by the Federal Circuit Court. Accordingly, there does not appear to be any basis for this contention.

26 26 During the hearing of the appeal, I raised with the solicitor appearing for the Minister whether other decisions of this Court relating to fraud by migration agents had any implications for this matter. The Minister requested leave to file a supplementary submission on this question, which I granted. The Minister subsequently filed a supplementary

submission dealing, among other things, with the decisions of the Full Court of this Court in *Singh v Minister for Immigration and Border Protection* [2016] FCAFC 141 and *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142. The Minister submitted, in summary, that: the findings made by the Tribunal about the conduct of the appellant's agent do not affect the validity of the decision made by the Tribunal on 3 June 2015; and the Full Court decisions in *Singh* and *Gill* are not relevant to the determination of this appeal. The appellant was given leave to file a responding submission by 7 April 2017, but did not do so. I accept the supplementary submissions of the Minister as summarised above.

27 27 For these reasons, the appeal is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, I will also make an order that the appellant pay the Minister's costs of the appeal.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky.

Associate:

Dated: 11 July 2017